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12 BENEFITS ADMINISTRATOR, INC.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

SEAN MICHAEL CARTER.

**Plaintiff,**

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K&K INSURANCE GROUP, INC., dba  
SPECIALTY BENEFITS ADMINISTRATOR,  
INC.; NATIONWIDE LIFE INSURANCE  
COMPANY; NATIONWIDE MUTUAL  
INSURANCE COMPANY; AON  
CORPORATION and DOES 1 to 100  
Defendants.

## Defendants.

No. 3:07-CV-05588-CRB

DEFENDANT K&K INSURANCE  
GROUP, INC.'S MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF ITS MOTION TO  
DISMISS OR, IN THE ALTERNATIVE,  
MOTION FOR A MORE DEFINITE  
STATEMENT

Hearing Date: January 18, 2008  
Time: 10:00 a.m.  
Dept: Courtroom 8  
(The Hon. Charles R. Breyer)

1    **I.        INTRODUCTION**

2               Plaintiff Sean Michael Carter brought this lawsuit to obtain disputed payments  
 3    under the no-fault medical treatment provision of an insurance policy purchased by Carter's  
 4    former employer, Golden Gate Gymnastics (Golden Gate), from defendant Nationwide Mutual  
 5    Insurance Company (Nationwide). But he also named K&K Insurance Group, Inc. (K&K) as a  
 6    defendant. K&K is an underwriting agent for Nationwide. It is not an insurance company and is  
 7    not, and never has been, a party to any policy or contract with Plaintiff or with Golden Gate.  
 8    Because California law is clear that a plaintiff may not maintain an action against an agent for  
 9    the liabilities of its principal, whatever the merits of Plaintiff's claims against Nationwide,  
 10   Plaintiff has no claim against the agent K&K under any theory. Accordingly, this action against  
 11   K&K must be dismissed.

12               In addition, Plaintiff's complaint is vague and ambiguous in that it alleges each  
 13   cause of action against all defendants. Without greater specification as to which actions are  
 14   being alleged against which defendants, K&K cannot reasonably respond to Plaintiff's blanket  
 15   allegations. Accordingly, pursuant to Fed. Rule Civ. Proc. 12(e), if the Court does not dismiss  
 16   the complaint entirely against K&K, Plaintiff must re-plead and specify which actions were  
 17   taken by which defendant.

18   **II.        STATEMENT OF FACTS**

19               K&K is not an insurance company, but is an insurance underwriting company.  
 20   See Exh. 1 (California Department of Insurance Agent License Status Report) to K&K's Request  
 21   For Judicial Notice, filed concurrently herewith; Compl. ¶ 2. In this capacity, K&K serves as the  
 22   agent to insurers in administering and underwriting insurance policies. K&K was the  
 23   underwriting agent for Nationwide at all times relevant to this lawsuit.

24               On or about August 24, 2004, Nationwide entered into an insurance contract with  
 25   Michael Lynch, d/b/a Golden Gate Gymnastics, Inc. Compl. ¶ 23; Exh. 2 to K&K's Request for  
 26   Judicial Notice. K&K was not a party to this contract; nor was Plaintiff. Compl. ¶ 23; Exh. 2 to  
 27   K&K's Request for Judicial Notice. In April, 2005, Plaintiff was either an independent  
 28   contractor hired by Golden Gate, or he was an employee of Golden Gate. Compl. ¶ 13. On or

1 about April 27, 2005, Plaintiff suffered quadriplegia after performing a flip at Golden Gate.  
 2 Plaintiff subsequently made a claim under the no-fault treatment benefits provision of the  
 3 insurance contract between Golden Gate and Nationwide. Compl. ¶ 18. On June 27, 2005,  
 4 Nationwide denied coverage for Plaintiff's no-fault medical treatment claims. Compl. ¶ 19.

5 **III. ARGUMENT**

6 **A. The Relevant Legal Standard**

7 A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6)  
 8 where the pleadings fail to state a claim upon which relief can be granted. *Cahill v. Liberty Mut.*  
 9 *Ins. Co.*, 80 F.3d 336, 338 (9th Cir. 1996). The Court should dismiss a cause of action where, as  
 10 here, "it appears beyond doubt that [the plaintiff] can prove no set of facts in support of [its]  
 11 claim which would entitle [it] to relief." *Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997).  
 12 Documents such as the insurance policy referenced in Plaintiff's complaint, whose contents are  
 13 alleged in a complaint and whose authenticity no party questions, but which are not physically  
 14 attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss.<sup>1</sup>  
 15 *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *Branch v. Tunnell*, 14 F.3d 449, 454  
 16 (9th Cir. 1994), overruled in part, on other grounds, by *Galbraith v. County of Santa Clara*, 307  
 17 F.3d 1119 (2002).

18 Plaintiff here has no claims upon which relief can be granted as to K&K. Each  
 19 claim asserted by Plaintiff against K&K requires a contractual underpinning. But K&K is an  
 20 underwriting agent, not an insurance company, and was not a party to any contract with Plaintiff  
 21 or with Golden Gate. Exhs. 1, 2 to K&K's Request for Judicial Notice. As such, K&K owed no  
 22 duties to Plaintiff or to Golden Gate. The Court should therefore grant this motion to dismiss  
 23 because California law precludes Plaintiff from bringing this action against K&K.

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27 <sup>1</sup> Here, Plaintiff's complaint references the insurance policy as "attached hereto as Exhibit 'A,'" Compl. ¶ 23, but Plaintiff did not actually attach the exhibit in the copy served on K&K.

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1                   **B. K&K as the Agent of the Insurance Company Cannot be  
2 Liable Under Any Theory for Plaintiff's Claims**

3                   **1. There Can Be No Claim for Breach of Contract Because  
4 K&K Had No Contract with Either Plaintiff or His  
5 Employer**

6                   K&K is an underwriting agent. Here, Nationwide was the insurer, and Golden  
7 Gate was the insured. There was no contract between K&K and Golden Gate. There was no  
8 contract between K&K and Plaintiff. The only contract was between Nationwide and Golden  
9 Gate. Compl. ¶ 23, Exh. 2 to K&K's Request for Judicial Notice.

10                  California law is clear that an agent of an insurance company cannot be liable for  
11 breach of contract because the agent is not a party to the insurance contract. In *Minnesota Mut.*  
12 *Life Ins. Co. v. Ensley*, 174 F.3d 977 (9th Cir. 1999) (applying California law), the plaintiff filed  
13 suit against a life insurance company and its agent for breach of contract, breach of the implied  
14 covenant of good faith and fair dealing, negligence, and fraud. On appeal, the court sustained  
15 summary judgment in favor of the agent on all claims, holding that “[u]nder California law, an  
16 insurance agent cannot be held liable for breach of contract or breach of the implied covenant of  
17 good faith and fair dealing because he is not a party to the insurance contract.” *Id.* at 981. See  
18 also *Gruenberg v. Aetna Insurance Co.*, 9 Cal.3d 566, 576 (1973) (complaint did not state cause  
19 of action against individual defendants—the insurer's agents—for breach of insurance  
20 agreements or bad faith because individuals were not parties to the agreements). It is well-  
21 established that an agent is not liable for the contracts entered into by its principal even if the  
22 agent negotiated and executed the contract. *Oppenheimer v. General Cable Corp.*, 143  
23 Cal.App.2d 293, 297 (1956) (demurrer sustained to breach of contract allegation as to the  
24 corporation's agents); *De Castro & Co. v. Liberty Steamship of Panama*, 186 Cal.App.2d 628,  
25 631 (1960) (agent is not liable for an instrument made for a principal by an agent). Indeed,  
26 California courts have held explicitly that an underwriting agent such as K&K cannot be sued for  
27 a breach of contract by its principal. *Henry v. Associated Indem. Corp.*, 217 Cal.App.3d 1405,  
28 1416-1417 (1990).

29                  There is no contract between K&K and the Plaintiff or the Plaintiff's former

1 employer, Golden Gate. There is no basis for a breach of contract claim. This action against  
 2 K&K must be dismissed.

3 **2. There Can Be No Claim for Breach of the Implied  
 4 Covenant of Good Faith and Fair Dealing**

5 Plaintiff's cause of action for breach of the implied covenant of good faith and  
 6 fair dealing also fails because no contract exists between Plaintiff or his former employer and  
 7 K&K. The prerequisite for any action for breach of the implied covenant of good faith and fair  
 8 dealing, sounding either in tort or contract, is the existence of a contractual relationship between  
 9 the parties, since the covenant is an implied term in the contract.

10 That law is well-established. *Seretti v. Superior Nat. Ins. Co.*, 71 Cal.App.4th  
 11 920, 928-929 (1999) ("Claims for bad faith violation of an insurance contract are 'strictly tied' to  
 12 an implied covenant of good faith and fair dealing, which arises out of an underlying contractual  
 13 relationship"); *Fireman's Fund Ins. Co. v. Maryland Casualty Co.*, 21 Cal.App.4th 1586, 1598-  
 14 99 (1994) (no breach of duty of good faith and fair dealing where there was no evidence of any  
 15 contractual relationship); *Love v. Fire Ins. Exchange*, 221 Cal.App.3d 1136, 1153 (1990)  
 16 (implied covenant is auxiliary and supplementary to express contractual obligations and has no  
 17 existence separate from the contract); *Austero v. National Cas. Co.*, 62 Cal.App.3d 511, 516-517  
 18 (1976) (no recovery for bad faith may be had absent a contractual relationship); *Gruenberg v.*  
 19 *Aetna Ins. Co.*, 9 Cal.3d 566, 576 (1973) (non-insurer defendants were not parties to the  
 20 agreements for insurance and therefore were not subject to an implied duty of good faith and fair  
 21 dealing).

22 Because agents are not parties to the contracts of their principals, California  
 23 courts have disallowed claims for breach of the implied covenant against an agent and have  
 24 explicitly disallowed a claim for breach of good faith and fair dealing against an underwriting  
 25 agent, such as K&K. *Henry v. Associated Indemnity Corp.*, 217 Cal.App.3d, 1405, 1416-1417  
 26 (1990) (cause of action against insurance underwriter for breach of covenant of good faith and  
 27 fair dealing dismissed because there was no direct contractual relationship between the  
 28 underwriter and the insured); *Cleary v. American Airlines, Inc.*, 111 Cal.App.3d 443, 456 (1980)

1 (discharged employee's complaint failed to state cause of action against other employees for  
 2 breach of the implied covenant of good faith and fair dealing because employees were not parties  
 3 to the employment contract); *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d 809 (1979) (agents of  
 4 insurance company were not parties to the insurance contract and thus not subject to the implied  
 5 covenant).

6 There is no contractual relationship between Plaintiff or his former employer and  
 7 K&K. Without a contractual underpinning, there is no independent claim for breach of the  
 8 implied covenant of good faith and fair dealing.

9 **3. There Can Be No Claim for Breach of Statutory Duty**

10 Plaintiff also fails to state a cause of action against K&K for breach of statutory  
 11 duty under California Insurance Code § 790.03(h). K&K owes no duty to Plaintiff under that  
 12 statute. *Henry v. Associated Indemnity Corp.*, 217 Cal.App.3d 1405, 1416 (1990) (underwriters'  
 13 relationship to insurance company akin to agency relationship, thus finding no separate right of  
 14 action under § 790.03 against underwriters); *Doctors' Co. v. Superior Court* 49 Cal.3d 39, 49  
 15 (1989) (holding that plaintiff failed to state a cause of action under California Insurance Code §  
 16 790.03(h) because the defendant acted solely as the insurer's agent, and did not share the  
 17 statutory duty alleged to have been violated); *see also Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 566,  
 18 576 (1973).

19 **4. There Can Be No Claim for Fraud or Deceit**

20 Plaintiff's Fourth Cause of Action is for "false promise" under section 1710(4) of  
 21 the California Civil Code. The elements of such a claim are: (1) that the defendant made a  
 22 promise to the plaintiff; (2) that this promise was important to the transaction; (3) that the  
 23 defendant did not intend to perform this promise when made; (4) that the defendant intended that  
 24 the plaintiff rely on this promise; (5) that the plaintiff reasonably relied on the defendant's  
 25 promise; (6) that the defendant did not perform the promised act; (7) that the plaintiff was  
 26 harmed; and (8) that the plaintiff's reliance on the defendant's promise was a substantial factor in  
 27 causing his harm. *See Engalla v. Permanente Medical Group, Inc.*, 15 Cal.4th 951, 973–974  
 28 (1997); CACI No. 1902.

1 Plaintiff's complaint fails to allege several of the necessary elements. First, there  
 2 is no allegation that K&K promised anything to Plaintiff. Rather, the only allegation is that  
 3 unspecified "Defendants" made promises to Golden Gate about insurance coverage. Compl. ¶  
 4 44. Second, there is no allegation that K&K (or any defendant) intended that Plaintiff rely on  
 5 any promise; rather the only allegation is that "Defendants" intended for Golden Gate to rely on  
 6 the alleged promise. Compl. ¶ 48. Third, as discussed above, because there is no insurance  
 7 contract between K&K and Plaintiff or Golden Gate, there is no allegation that K&K failed to  
 8 perform any promise or did not intend to perform when any promise was made.

9 Plaintiff's complaint also fails to satisfy the heightened pleading standard of Rule  
 10 9(b) of the Federal Rules of Civil Procedure. *In re GlenFed, Inc. Secs. Litig.*, 42 F.3d 1541,  
 11 1547-48 & n.7 (9th Cir. 1994) (en banc) ("Rule 9(b) requires particularity as to the  
 12 circumstances of the fraud — this requires pleading facts that by any definition are 'evidentiary':  
 13 time, place, persons, statements made, explanation of why or how such statements are false or  
 14 misleading"). The complaint does not even approach the required showing of particularity and  
 15 dismissal is required on this basis alone. Compl. ¶ 48.

16 Plaintiff could not meet the required showing of particularity in any event.  
 17 Plaintiff does not — and cannot — allege that K&K made any representation at all to Plaintiff, let  
 18 alone a representation on which Plaintiff reasonably relied. These are necessary elements of  
 19 promissory fraud or any fraud claim, and Plaintiff's complaint fails to state a claim under any  
 20 theory of fraud or deceit.

21 **5. There Can Be No Claim for Negligence**

22 Plaintiff's fifth and seventh causes of action based on negligence also fail against  
 23 K&K. Any claim of negligence, including negligent misrepresentation, "rests upon the existence  
 24 of a legal duty, imposed by contract, statute or otherwise, owed by a defendant to the injured  
 25 person." *Eddy v. Sharp*, 199 Cal.App.3d 858, 864 (1988). As discussed above, K&K was only  
 26 Nationwide's underwriting agent and had no contract with Plaintiff or his employer, nor did  
 27 K&K owe any duty to Plaintiff. Even if Plaintiff could point to some negligence on the part of  
 28 K&K, which he cannot (instead making only vague allegations against unnamed "Defendants"),

1 an insurance agent cannot be held liable by a policyholder—and Plaintiff was not even the  
 2 policyholder—for negligence in performing its duties owed to its principal, the insurance  
 3 company. An insurance agent is not liable to the insured for negligence committed within the  
 4 scope of its agency or employment. *Lippert v. Bailey*, 214 Cal.App. 2d 376, 382 (1966); *Gasnik*  
 5 *v. State Farm Ins. Co.*, 825 F.Supp. 245, 249 (E.D. Cal. 1992) (applying Calif. law) (“Where an  
 6 agent is duly constituted and names his principal and contracts in his name and does not exceed  
 7 his authority, the principal is responsible and not the agent”). The lack of any contract or other  
 8 legal relationship between Plaintiff and K&K defeats the claim for negligent misrepresentation  
 9 as a matter of law. *Eddy v. Sharp*, 199 Cal.App.3d at 864 (1988).

10 Plaintiff also fails to allege the required elements for either negligent  
 11 misrepresentation or negligent infliction of emotional distress. For the same reasons discussed  
 12 above with respect to the claims against K&K for intentional misrepresentation, Plaintiff’s fifth  
 13 cause of action fails to state a claim for negligent misrepresentation. *Fox v. Pollack*, 181  
 14 Cal.App.3d 954, 962 (1986) (elements of negligent misrepresentation). The first element to  
 15 establish a claim for negligent misrepresentation is that the defendant represented to plaintiff that  
 16 an important fact was true. *Id.* Plaintiff does not – and cannot – allege that K&K made any  
 17 representations to him. Plaintiff also fails to meet a further requirement for negligent  
 18 misrepresentation that the plaintiff reasonably relied on defendant’s representation. Plaintiff has  
 19 not alleged – and cannot allege – that he reasonably relied on any representation by K&K  
 20 because there was no representation made by K&K to Plaintiff.

21 Similarly, Plaintiff’s seventh cause of action for negligent infliction of emotional  
 22 distress fails as a matter of law because Plaintiff has not – and cannot – plead the required  
 23 elements for such a claim. The California Supreme Court has allowed plaintiffs to bring  
 24 negligent infliction of emotional distress actions as “direct victims” in only three types of factual  
 25 situations: (1) the negligent mishandling of corpses (*Christensen v. Superior Court*, 54 Cal.3d  
 26 868, 879 (1991); (2) the negligent misdiagnosis of a disease that could potentially harm another  
 27 (*Molien v. Kaiser Foundation Hospitals*, 27 Cal.3d 916, 923 (1980); and (3) the negligent breach  
 28 of a duty arising out of a preexisting relationship (*Burgess v. Superior Court*, 2 Cal.4th 1064,

1 1076 (1992). Whether a duty was owed to the plaintiff is a question of law for the court. CACI  
 2 No. 1620. Here, K&K owed no duty to Plaintiff because there was no preexisting relationship  
 3 between Plaintiff and K&K. Once again, the lack of a contract is fatal to these causes of action.

4 **6. The Intentional Infliction of Emotional Distress Cause  
 5 of Action Fails**

6 Plaintiff also fails to state a claim against K&K for intentional infliction of  
 7 emotional distress for two reasons. First, California courts have refused to grant a claim for  
 8 emotional distress based on a breach of contract. *Erlich v. Menezes*, 21 Cal.4th 543 (1999)  
 9 (holding that damages for mental suffering and emotional distress are generally not recoverable  
 10 in an action for breach of an ordinary commercial contract in California); Rest.2d Contracts, §  
 11 353 (“Recovery for emotional disturbance will be excluded unless the breach also caused bodily  
 12 harm or the contract or the breach is of such a kind that serious emotional disturbance was a  
 13 particularly likely result”).

14 Second, intentional infliction of emotional distress requires outrageous conduct by  
 15 a defendant that is intended to cause emotional distress. Whether the denial of Plaintiff’s  
 16 insurance claim rises to the level of outrageous conduct necessary to sustain this claim is a matter  
 17 of law for the court to decide. *Fletcher v. Western Life Insurance Co.*, 10 Cal.App.3d 376, 397  
 18 (1970) (“It is for the court to determine whether on the evidence severe emotional distress can be  
 19 found . . . ”). To be “outrageous,” the conduct must be so must be “so extreme as to exceed all  
 20 bounds of that usually tolerated in a civilized community.” *Davidson v. City of Westminster*, 32  
 21 Cal.3d 197, 209 (1982). “It is not enough that the conduct be intentional and outrageous. It must  
 22 be conduct directed at the plaintiff, or occur in the presence of a plaintiff of whom the defendant  
 23 is aware.” *Christensen v. Superior Court*, 54 Cal.3d 868, 903-904 (1991). Here, Plaintiff claims  
 24 that his emotional distress arose out of a special relationship between him and Golden Gate’s  
 25 insurer, not K&K. Compl. ¶¶ 63-64. He alleges that the denial of a claim by the insurer,  
 26 Nationwide, not by K&K, was the cause of his emotional distress. Compl. ¶ 65. As a matter of  
 27 law, the denial of an insurance claim by the insurer rather than by K&K cannot amount to  
 28 “outrageous” conduct by K&K giving rise to tort liability for emotional distress. The complaint

1 fails to state a claim against K&K.

2       **C. Plaintiff's Complaint is Vague and Ambiguous, and a More**  
 3       **Definite Statement is Required**

4           To the extent the complaint against K&K is not dismissed in its entirety, Plaintiff  
 5 should be directed to amend his complaint to specify which conduct and which claims apply to  
 6 each named defendant. Plaintiff's complaint avers generally to "Defendants." Plaintiff is well  
 7 aware, however, that not all allegations may be asserted as to K&K consistent with the  
 8 obligations of Rules 8(e) and 11 of the Federal Rules of Civil Procedure. For example,  
 9 Defendants allege a "written contract of insurance with Defendants," Compl. ¶¶ 23, but the  
 10 contract itself establishes that K&K was not a party to it. Without greater specification as to  
 11 which actions are being alleged against which defendants, K&K cannot reasonably respond to  
 12 Plaintiff's blanket allegations. *Van Dyke Ford, Inc. v. Ford Motor Co.*, 399 F.Supp.277, 284  
 13 (E.D. Wis. 1975) (plaintiffs required to make a more definite statement of claims where original  
 14 charging allegations referred generally to "plaintiffs" and "defendants," although not all  
 15 plaintiffs and not all defendants were involved in each claim). On a Rule 12(e) motion, plaintiffs  
 16 may be ordered to specify which plaintiffs and which defendants were involved; and, as to  
 17 references to various agreements, to identify each such agreement by date and parties and as to  
 18 whether each was written or oral. At the very least, Plaintiff must re-plead and specify which  
 19 actions were taken by which defendants so that further law and motion and discovery can focus  
 20 on the proper claims alleged as to each defendant. Fed. Rule Civ. Proc. 12(e) ("If a pleading to  
 21 which a responsive pleading is permitted is so vague or ambiguous that a party cannot  
 22 reasonably be required to frame a responsive pleading, the party may move for a more definite  
 23 statement before interposing a responsive pleading.").

24       **IV. CONCLUSION**

25           Plaintiff has brought this lawsuit to obtain coverage under an insurance policy  
 26 issued by Nationwide to Golden Gate and for harm allegedly suffered as a result of the denial of  
 27 coverage under that policy. However, he has named as a defendant not only the insurance  
 28 company that issued the policy but the underwriting agent, K&K. There was no contract

1 between K&K and plaintiff nor between K&K and Golden Gate. As a matter of law, Plaintiff  
2 has no claim against K&K under any theory. For the reasons stated above, this motion to  
3 dismiss must be granted.

4 DATED: November 30, 2007

5 Bingham McCutchen LLP

6 By: \_\_\_\_\_ /s/  
7 Elizabeth Kennedy  
8 Attorneys for Defendant  
9 K&K INSURANCE GROUP, INC., d/b/a  
SPECIALTY BENEFITS ADMINISTRATOR, INC.

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